

**OFFICE OF ZONING AND ADMINISTRATIVE HEARINGS**  
**Stella B. Werner Council Office Building**  
**Rockville, Maryland 20850**  
**(240) 777-6660**

**IN THE MATTER OF:** \*

**HELENA TENENHOLTZ AND HECTOR** \*

**GOMEZ** \*

Applicants \*

Helena Tenenholtz and Hector Gomez \*

For the Application \*

\*\*\*\*\*

Marco Guillen \*

Housing Code Inspector \*

For the Department of Housing \*

And Community Affairs \*

\*\*\*\*\*

Before: Michele LeFaivre, Hearing Examiner

OZAH Case No. CU 17-13

**HEARING EXAMINER'S REPORT AND DECISION**

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## I. STATEMENT OF THE CASE

On February 22, 2017, Applicants Helena Tenenholtz and Hector Gomez filed an application seeking approval of a conditional use to allow an Attached Accessory Apartment in the basement addition of a single-family detached home at 7006 Braeburn Court, Bethesda, Maryland, 20817. The subject property is identified as Lot 17, Block 3, Plat No. 2388, in the Bannockburn Coop Inc. subdivision. It is zoned R-60 (Residential Detached). Records from the Maryland State Department of Assessment and Taxation (SDAT) reflect the Applicants own the subject property. Exhibit 5.

Most accessory apartments may be licensed without conditional use approval provided they meet certain standards in the Montgomery County Code. *Montgomery County Code*, §29-19(b). The licensing requirements in the Code require compliance with standards in the Montgomery County Zoning Ordinance. *Id.*; *Montgomery County Zoning Ordinance*, §§59-3.3.3.A and B. Two Zoning Ordinance criterion require that (1) the property have a minimum number of on-site parking spaces and (2) the apartment be separated by a minimum distance from another accessory apartment. *Zoning Ordinance*, §§59-3.3.3.A.2.a.iii.(b); 59-3.3.3.B.2.d. When the application does not meet these standards, the Applicant must apply for a conditional use to be decided by the Hearing Examiner following the procedures of Section 59.7.3.1 of the Zoning Ordinance.<sup>1</sup> *Id.*, §59-3.3.3.A.2.c. These procedures require a review and recommendation on the application from Staff of the Montgomery County Planning Department (Technical Staff or Staff) and a public hearing before the Hearing Examiner.

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<sup>1</sup> All citations in this Decision are to the 2014 Zoning Ordinance for Montgomery County, adopted September 30, 2014 (Ordinance No. 17-52), as amended effective December 25, 2015, in ZTA 15-09 (Ordinance No. 18-08, adopted December 1, 2015).

The Applicants filed a license application for a Class 3 Accessory Apartment with the Montgomery County Department of Housing and Community Affairs (DHCA). On February 7, 2017, DHCA declined to accept the application and referred it to the Office of Zoning and Administrative Hearings (OZAH) for a conditional use approval. DHCA made the referral because the property did not meet the on-site parking requirements. Exhibits 3, 4.

By notice issued on May 4, 2017, the public hearing before the Hearing Examiner was scheduled for June 16, 2017. Exhibit 23. Technical Staff issued its report recommending approval of the application on June 2, 2017, subject to two conditions limiting occupancy to two adults and prohibiting other residential rental uses on the property. Exhibit 25.

The hearing went forward as scheduled on June 16, 2017, and the Applicants appeared *pro se*. The Applicants adopted the findings and conclusions in the Technical Staff report (Exhibit 25) and the information in their “case statement” (Exhibit 6) as their own evidence of record without further additions. T. 7. They also agreed to comply with Staff’s proposed conditions of approval. T.5. Mr. Marco Guillen, Housing Code Inspector, presented the results of his inspection of the apartment and analysis on whether the apartment complied with the Housing Code (Chapter 26 of the Code). Their testimony is summarized in detail below, where relevant.

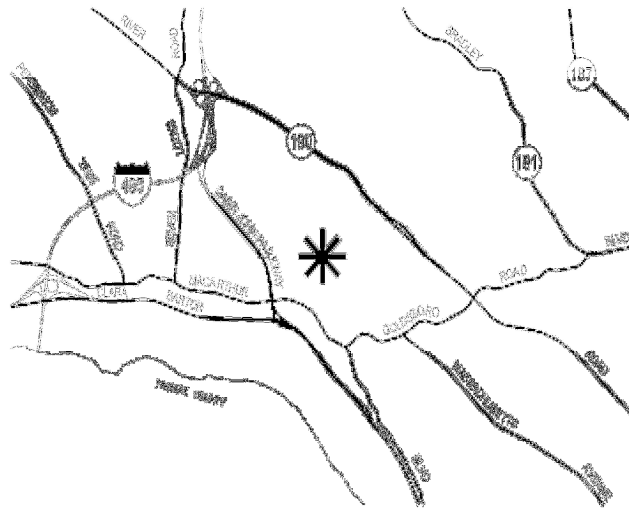
There were no other witnesses present at the hearing and no letters of support or opposition were received in this matter. The record was left open an additional ten (10) days for receipt of the timely received hearing transcript. The record closed as scheduled on June 27, 2016.

Based on a thorough review of the entire record, and for the reasons stated herein, the Hearing Examiner finds sufficient evidence of adequate on-street parking available to grant Applicants’ request to deviate from the on-site parking requirements under Section 59-3.3.3.A.2.c of the Zoning Ordinance.

## II. FACTUAL BACKGROUND

### A. The Subject Property

The 16,905-square foot property is located on Braeburn Court in Bethesda (the Property or Site). Braeburn Court is a cul-de-sac. The Site is wedge-shaped, zoned R-60, and has 57 feet of frontage on Braeburn Court. The Property also fronts on Laverock Lane and Braeburn Parkway with frontages of 110 feet and 93 feet respectively. Laverock Lane and Braeburn Parkway are both dedicated public rights-of-way and are not improved where they abut the Property. Braeburn Parkway contains an unnamed tributary to the Cabin John Creek Lower main stem. The unique shape of this lot, fronting on three public rights-of-way is considered a through-lot by the Department of Permitting Services (DPS) with three front yards, two side yards and no rear yard. The general location of the property is shown on a vicinity map in the Staff Report. Exhibit 25.



Vicinity Map  
Exhibit 25

The property is improved with a two-story detached house constructed in 1951, according to SDAT records. Exhibit 5. There is no garage or driveway associated with this Site. According to the Maryland Department of Assessments and Taxation records, the existing dwelling unit has

an enclosed area of 1,716 square feet. Exhibit 25. The Site contains large trees and extensive, well-maintained landscaping. A small shed is located in the front yard abutting Laverock Lane.

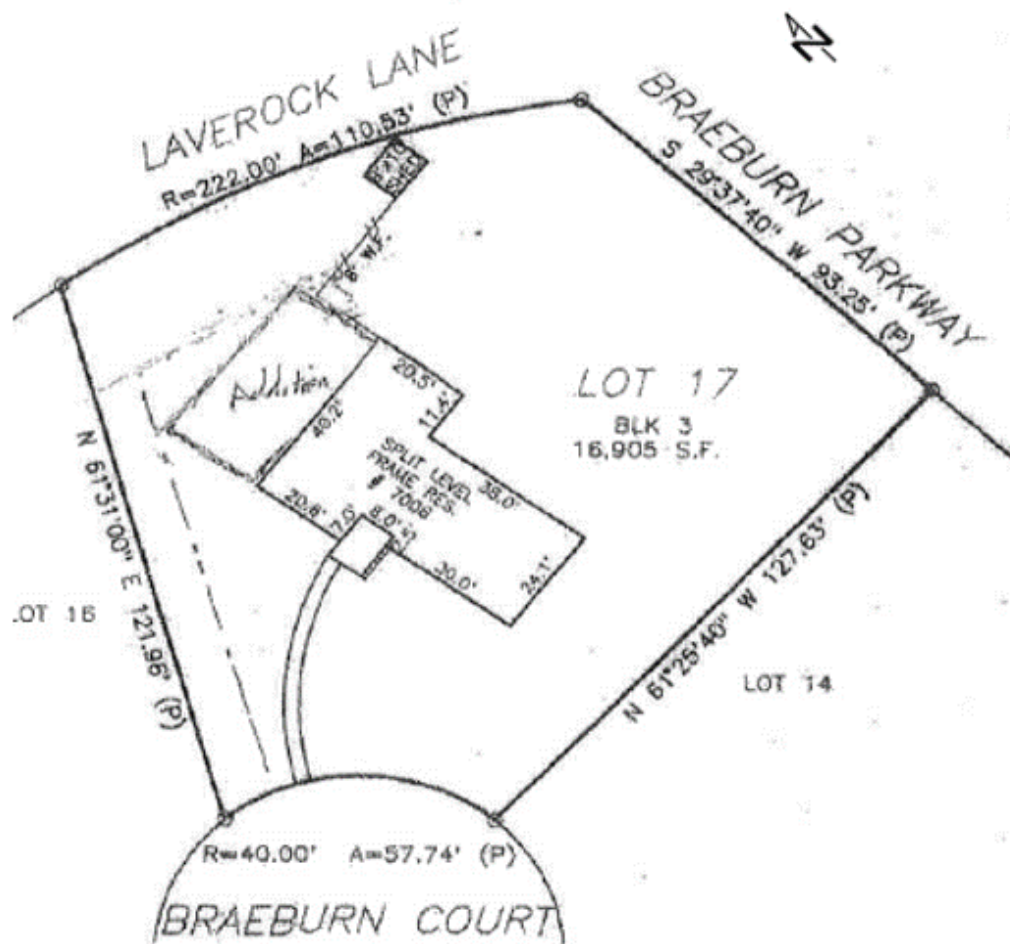


**Braeburn Court Frontage  
Exhibit 25**



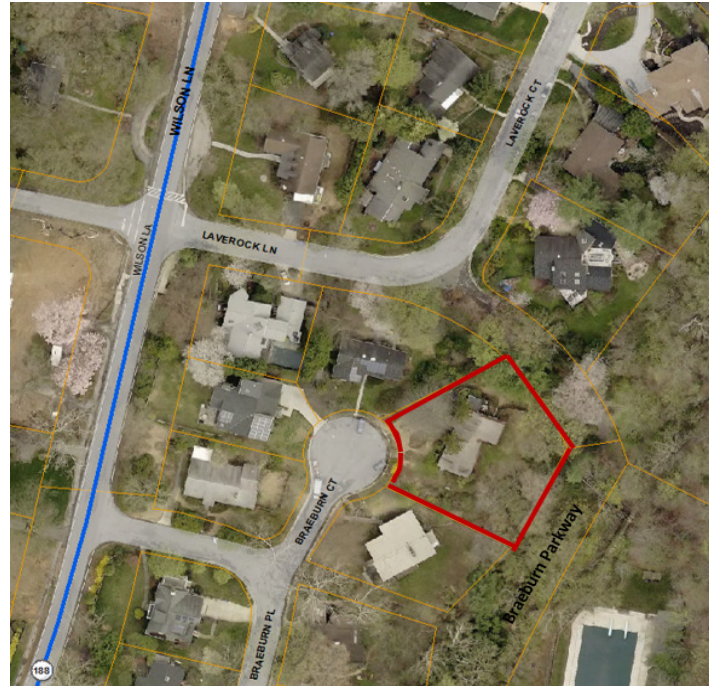
**Location of Proposed Accessory  
Apartment Looking Southeast  
Exhibit 25**

The Property plat is shown below (Exhibit 25):



Plat of Property  
Exhibit 25

In support of its conclusion, Staff submitted an aerial photograph with the 300-foot diameter marked (Exhibit 22, p. 7, shown on the following page).



**Aerial View of Property Outlined in Red  
Exhibit 25**

### **B. Proposed Use**

The Applicants propose an attached accessory apartment in the basement addition of the existing single-family detached home. The addition would consist of the basement addition and an upper deck to be constructed on the north side of the dwelling. The apartment would be occupied by Ms. Tenenholtz father. T. 9.

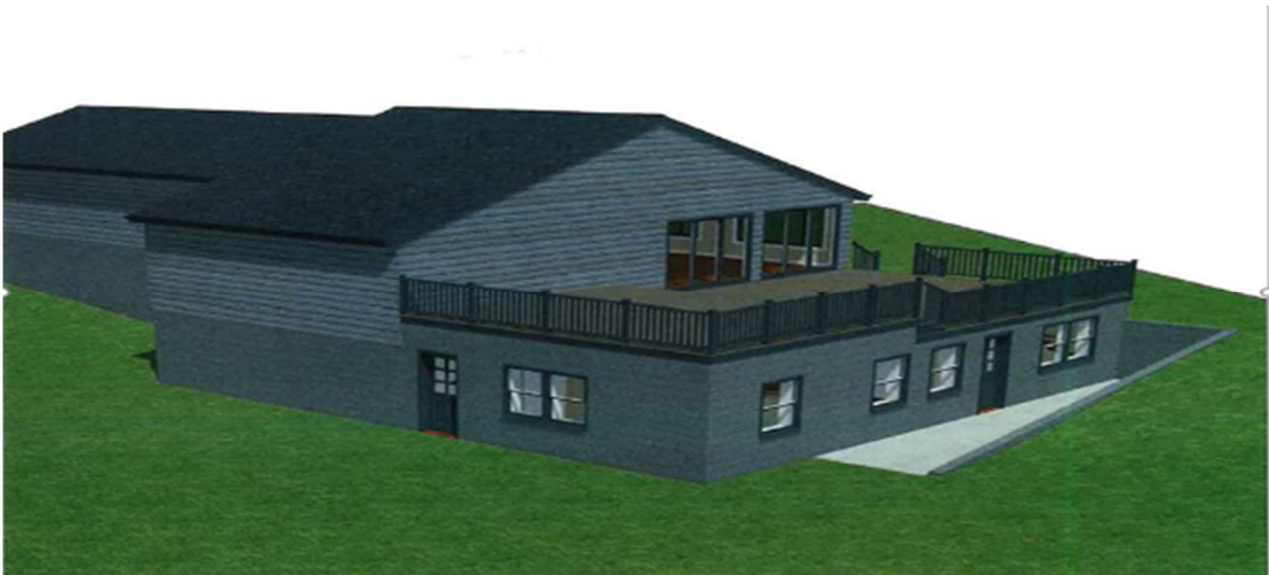
Planning Staff advised that the apartment consists of 684 square feet, which is less than 50% of the total floor area in the principal dwelling (1,716 square feet) and less than 1,200 square feet. After construction of the new addition, the total square footage for the principal dwelling unit will be approximately 2,400 square feet, and the proposed use will continue to be less than 50% of the total floor area. The accessory apartment would be located in the lower floor of the new addition proposed to be constructed. The architectural plans submitted with the petition proposed two alternative plans. Alternative one shows the apartment entrance in the rear of the



dwelling. Exhibit 2. Alternative 2 shows apartment entrances on the rear and side of the dwelling.  
Exhibit 2.



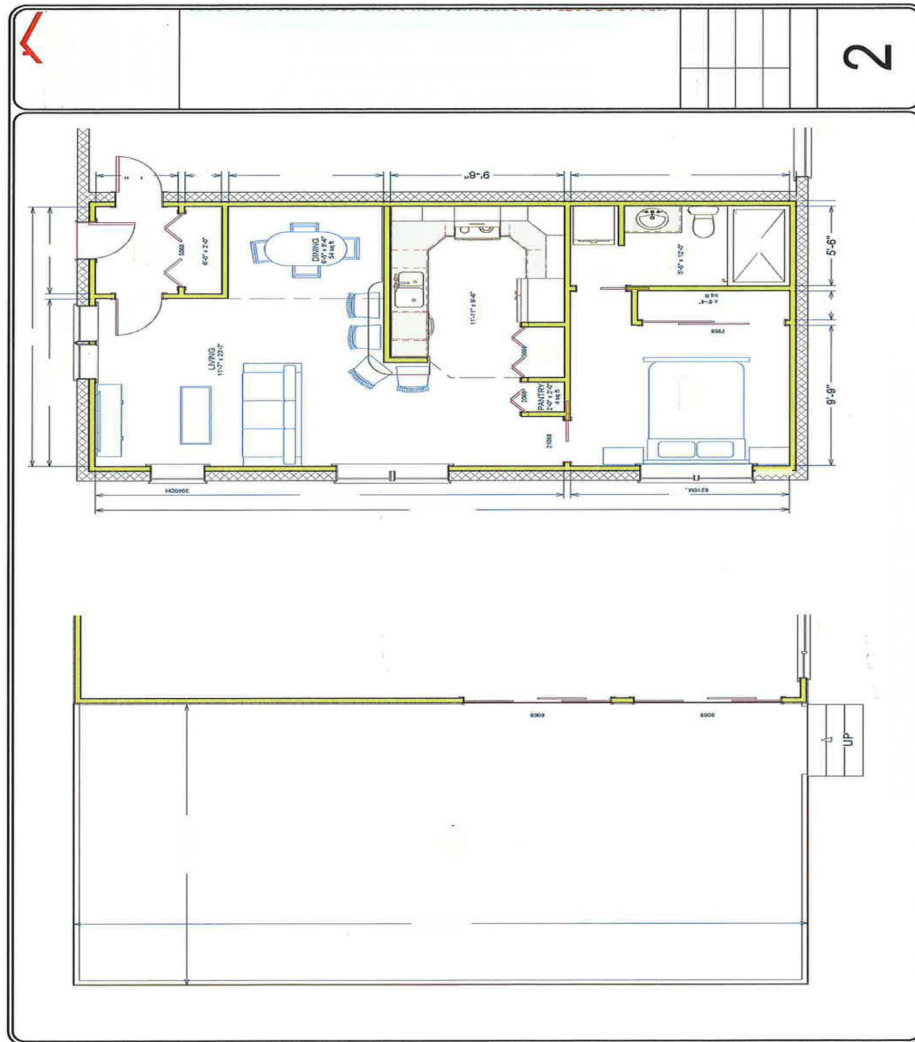
**Alternative 1. Accessory Apartment  
Proposed Rear Entrance  
Exhibit 2**



**Applicant's Alternative 2 Accessory Apartment  
Proposed Entrances on Side and Rear  
Exhibit 2**



The accessory apartment plan shows one bedroom, a kitchen, a dining area, and a bath. Access would be provided from a walkway off the main dwelling's walkway (Exhibit 2, below):



T. 24.

**Proposed Accessory Apartment Floor Plan,  
Exhibit 2**

The Statement of the Case submitted by the Applicants explains that a specimen tree in the front yard prevents Applicants from providing a driveway for off-street parking. Exhibit 2. The photograph below depicts this tree. Exhibit 2.



**Specimen Tree in Front Yard  
Exhibit 2**

The DHCA report instructs Applicants that 1) exterior lighting fixtures must be installed to provide adequate lighting along the walkway and sidewalk leading to the accessory apartment and an exterior light fixture must be installed above the accessory apartment entrance door. Exhibit 24. The Hearing Examiner discussed the need to provide a walkway to the apartment and DHCA's comments, which would be approval conditions. T. 23-24.

Ms. Tenenholtz testified to many homes in the neighborhood being rebuilt with driveways and garages. Consequently, there are only 2 other houses on her cul-de-sac, hers and the house next door, that do not have a driveway or garage. She further testified to there being little competition for parking in the cul-de-sac or up and down the street. T. 18. The Staff Report found the property frontage measures 57 feet wide, which provides adequate on street parking for existing residents and the future resident of the accessory apartment. Exhibit 25.

### **C. Community Response**

Neither Planning Staff nor the Hearing Examiner received any opposition to the proposed apartment. Exhibit 25.

### III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A conditional use is a zoning device authorizing certain uses provided pre-set legislative standards are met. Ordinarily, an applicant may establish an accessory apartment without the need for conditional use approval. This is accomplished by approval of a Class III Accessory Apartment license from DHCA under Section 29-19(b) of the Montgomery County Code. The Code requires compliance with “limited use” standards in the Zoning Ordinance as well as other licensing standards. *Zoning Ordinance*, §59-3.3.3.A.2; 59-3.3.3.B.2. Two of the Zoning Ordinance standards require the proposed apartment (1) be more than 300 feet from another accessory apartment and (2) meet minimum on-site parking requirements. *Id.*, §§59-3.3.3.A.2.a.iii.(b), 59-3.3.3.B.2.d. If a proposed apartment does not meet these two standards, it may still be approved by filing an application for a conditional use. *Id.*, §59-3.3.3.A.2.c. For approval of the conditional use, an application that does not meet the minimum separation requirement must demonstrate (*Id.*, §59-3.3.3.A.c.ii):

When considered in combination with other existing or approved Accessory Apartments, the deviation in distance separation does not result in an excessive concentration of similar uses, including other conditional uses, in the general neighborhood of the proposed use.

An application with insufficient parking must demonstrate adequate on-street parking to support the use (§59-3.3.3.B.2.d):

- i. Fewer off-street spaces are allowed if there is adequate on-street parking. On-street parking is inadequate if:
  - (a) the available on-street parking for residents within 300 feet of the proposed Accessory Apartment would not permit a resident to park on-street near his or her residence on a regular basis; and
  - (b) the proposed Accessory Apartment is likely to reduce the available on-street parking within 300 feet of the proposed Accessory Apartment.

An analysis of the applicable limited standards, and whether the proposed use may deviate from the on-site parking and minimum separation requirements, is set forth below.

**A. Limited Use Standards for Accessory Apartments, in General (Section 59.3.3.3.A.)**

This section contains standards for all accessory apartments, whether they are attached to or detached from a single-family home:

***Section 59.3.3.3.A. – Accessory Apartments, In General***

***1. Defined, In General***

*Accessory Apartment means a second dwelling unit that is subordinate to the principal dwelling. An Accessory Apartment includes an Attached Accessory Apartment and a Detached Accessory Apartment.*

Conclusion: The Zoning Ordinance defines a “dwelling unit” as “a building or portion of a building providing complete living facilities for not more than one household, including, at a minimum, facilities for cooking, sanitation, and sleeping.” *Id.*, §59-1.4.2. The proposed apartment has a full kitchen for cooking, one bathroom, and one bedroom. It meets this definition.

***2. Use Standards for all Accessory Apartments***

***a. Where an Accessory Apartment is allowed as a limited use, it must satisfy the following standards:***

- i. Only one Accessory Apartment is permitted for each lot.*
- ii. The Accessory Apartment was approved as a conditional use before May 20, 2013 and satisfies the conditions of the conditional use approval; or*
- iii. The Accessory Apartment is licensed by the Department of Housing and Community Affairs under Chapter 29 (Section 29-19); and*
  - (a) the apartment has the same street address as the principal dwelling;*

Conclusion: The Applicants are requesting approval for a one basement accessory apartment on the subject site only, therefore, the standard in §59-3.3.3.A.2.a.i has been met. The accessory apartment will have the same address as the principal dwelling. This standard is met.

*(b) One on-site parking space is provided in addition to any required on-site parking space for the principal dwelling; however, if a new driveway must be constructed for the Accessory Apartment, then 2 on-site parking spaces must be provided;*

Conclusion: In addition to the one on-site parking space for the accessory apartment use required under this section, Section 59.6.2.4.B of the Zoning Ordinance requires the provision of two on-site parking spaces for the main dwelling. As discussed in the previous section, the property does not have a driveway and installation of a driveway is not proposed or feasible. The property therefore does not meet the on-site parking requirements for the conditional use. However, as provided in Section 59.A3.3.3.A.2.b, Applicants filed an application for a conditional use seeking approval to deviate from the on-site parking requirements contending there is adequate on street parking to accommodate both uses. Exhibit 2. The adequacy of available on-street parking is discussed below in Section 59.3.3.3.A.2.c.i.

*(c) The maximum gross floor area for an Accessory Apartment, including any floor area used for an Accessory Apartment in a cellar, must be less than 50% of the total floor area in the principal dwelling, including any floor area used for an Accessory Apartment in the cellar of the principal dwelling, or 1,200 square feet, whichever is less;*

Conclusion: The Staff Report states the proposed accessory apartment is approximately 684 square feet, which is less than 50% of the total floor area in the principal dwelling (1,716 square feet) and less than 1,200 square feet. After construction of the new addition total square footage for the principal dwelling unit will be approximately 2,400 square feet, and the proposed use will continue to be less than 50% of the total floor area. The Hearing Examiner finds this standard is met.

*(c) The maximum floor area used for an Accessory Apartment in a proposed addition to the principal dwelling must not be more than 800 square feet if the proposed addition increases the footprint of the principal dwelling; and*

Conclusion: The proposed addition consists will increase the footprint of the house by 684 feet, well under the maximum of 800 square feet.

*(d) The maximum number of occupants is limited by Chapter 26 (Section 26-5); however, the total number of occupants residing in the Accessory Apartment who are 18 years or older is limited to 2.*

Conclusion: The total number of occupants residing in the Accessory Apartment who are 18 years are older is one.

*iv. An Accessory Apartment must not be located on a lot where any other allowed rental Residential use exists; however, an Accessory Apartment may be located on a lot in an Agricultural or Rural Residential zone that includes a Farm Tenant Dwelling or a Guest House.*

Conclusion: A condition of approval will prohibit any other rental residential uses on the property. The Hearing Examiner finds that the use, as conditioned, will meet this standard.

*v. In the Agricultural and Rural Residential zones, an Accessory Apartment is excluded from any density calculations. If the property associated with an Accessory Apartment is subsequently subdivided, the Accessory Apartment is included in the density calculations.*

Conclusion: The property is zoned R-60, which is a Residential Detached Zone. Therefore, this standard is not applicable to this application.

*vi. Screening under Division 6.5 is not required.*

Conclusion: No finding is required.

*vii. In the AR zone, this use may be prohibited under Section 3.1.5, Transferable Development Rights.*

Conclusion: Not applicable. The property is located in the R-60 (Residential Detached) Zone.



***b. An Accessory Apartment conditional use application may be filed with the Hearing Examiner to deviate from the following limited use standards;***

- i. The number of on-site parking spaces; or*
- ii. The minimum distance from any other Attached or Detached Accessory Apartment*

Conclusion: The Applicants propose to deviate from the on-site parking space requirement and have filed a conditional use application to do so. This is discussed in the next paragraph, below.

Staff reports the nearest attached or detached accessory apartment is over 1,000 feet away.

***c. Where an Accessory Apartment conditional use application is filed under Section 3.3.3.A.2.b, the Hearing Examiner may approve a conditional use for the Accessory Apartment under Section 7.3.1, except that the findings under Section 7.3.1 E are not applicable to this type of conditional use. The limited use standards of Section 3.3.3.A.2.a and Section 3.3.3.A.2.c apply to all accessory apartment conditional use applications. In addition, the limited use standards of Section 3.3.3.B.2 apply to the Attached Accessory Apartment applications and the limited use standards of Section 3.3.C.2 apply to the Detached Accessory Apartment applications.***

- i. Fewer off-street spaces are allowed if there is adequate on-street parking. On-street parking is inadequate if:*
  - (a) the available on-street parking for residents within 300 feet of the proposed Accessory Apartment would not permit a resident to park on-street near his or her residence on a regular basis; and*
  - (b) The proposed Accessory Apartment is likely to reduce the available on-street parking within 300 feet of the proposed Accessory Apartment.*

Conclusion: Staff reports adequate on-street parking to serve the use. Of the 16 one-family residential properties within 300 feet of the subject site, nine have driveways. The remaining seven residential properties do not have driveways or garages. The subject property has approximately 57 feet of frontage on Braeburn Court. Based on the property's frontage, three average-size cars could be parked perpendicularly directly in front of the property. Exhibit 25. Based on this record,

the Hearing Examiner finds on-street parking is adequate for the use and properties within 300 feet of the proposed accessory apartment.

*ii. When considered in combination with other existing or approved Accessory Apartments, the deviation in distance separation does not result in an excessive concentration of similar uses, including other conditional uses, in the general neighborhood of the proposed use.*

Conclusion: Staff reports there is no other accessory apartment within a 300-foot radius from the subject property and the closest is more than 1,000 feet away. Exhibit 25. The Hearing Examiner finds approval of this application will not result in an excessive concentration of accessory apartments within the neighborhood.

## **B. Use Standards for Attached Accessory Apartments (Section 59.3.3.3.B)**

### ***Section 59.3.3.3.B. – Attached Accessory Apartment***

#### **1. *Defined***

*Attached Accessory Apartment means a second dwelling unit that is part of a detached house building type and includes facilities for cooking, eating, sanitation, and sleeping. An Attached Accessory Apartment is subordinate to the principal dwelling.*

Conclusion: As noted, the apartment proposed meets the definition of dwelling unit. It is less than 50% of the floor area of the principal dwelling, and therefore subordinate to the single-family detached home. The apartment proposed here meets the definition of an “attached accessory apartment.”

#### **2. *Use Standards***

*Where an Attached Accessory Apartment is allowed as a limited use, it must satisfy the use standards for all Accessory Apartments under Section 3.3.3.A.2 and the following standards:*

##### ***a. A separate entrance is located:***

- i. On the side or rear of the dwelling;*
- ii. At the front of the principal dwelling, if the entrance existed before May*

- 20, 2013; or*
- iii. At the front of the principal dwelling, if it is a single entrance door for the use of the principal dwelling and the Attached Accessory Apartment.*

Conclusion: The accessory apartment proposed would have an entrance at the rear or side of the dwelling. This standard is met.

- b. The detached house in which the Accessory Apartment is to be created or to which it is to be added must be at least 5 years old on the date of the application for a license or a conditional use.*

Conclusion: According to the property tax records, the detached dwelling was built in 1951. Exhibit 5. Therefore, the Hearing Examiner finds the dwelling in which the accessory apartment will be located is more than 5 years old, meets this standard.

- c. In the RE-2C, RE-1, and R-200 zones the Attached Accessory Apartment is located at least 500 feet from any other Attached or Detached Accessory Apartment, measured in a line from side lot line to side lot line along the same block face.*

Conclusion: The property is located in the R-60 (Residential Detached) Zone. Therefore, this standard inapplicable.

- d. In the RNC, R-90, and R-60 zones, the Attached Accessory Apartment is located at least 300 feet from any other Attached or Detached Accessory Apartment, measured in a line from side lot line to side lot line along the same block face.*

Conclusion: As discussed above, there is no one other accessory apartment located within 300 feet. Thus, the application meets this standard.

#### **IV. CONCLUSION AND DECISION**

Weighing all the testimony and evidence of record under the “preponderance of the evidence” standard specified in Zoning Ordinance §59.7.1.1, the Hearing Examiner concludes the conditional use proposed in this application would satisfy all of the requirements for the use.

Based on the foregoing findings and conclusions and a thorough review of the entire record, the application of Helena Tenenholtz and Hector Gomez (CU 17-13), for a conditional use under Section 59.3.3.3.A. and B. of the Zoning Ordinance, to operate an Attached Accessory Apartment at 7006 Braeburn Court, Bethesda, Maryland, is hereby **GRANTED**, subject to the following conditions:

1. The Applicants shall be bound by all of their testimony and exhibits of record, subject to the conditions listed here;
2. The total number of occupants residing in the accessory apartment who are 18 years or older is limited to 2;
3. No other rental residential uses are allowed to be located on the subject site;
4. The Applicants must comply with any directions of the Housing Code Inspector to ensure safe and code-compliant occupancy; and
5. The Applicants must obtain and satisfy the requirements of all licenses and permits, including but not limited to building permits and use and occupancy permits, necessary to occupy the conditional use premises and operate the conditional use as granted herein. The Applicants shall at all times ensure that the conditional use and premises comply with all applicable codes (including but not limited to building, life safety and handicapped accessibility requirements), regulations, directives and other governmental requirements, including the annual payment of conditional use administrative fees assessed by the Department of Permitting Services.

Issued this 18th day of July, 2017.



Michele LeFaivre  
Hearing Examiner

#### NOTICE OF RIGHT TO REQUEST ORAL ARGUMENT

Any party of record may file a written request to present an appeal and oral argument before the Board of Appeals, within 10 days after the Office of Zoning and Administrative Hearings issues the Hearing Examiner's Report and Decision. Any party of record may, no later than 5 days after a request for oral argument is filed, file a written opposition to it or request to participate in oral argument. If the Board of Appeals grants a request for oral argument, the argument must be limited to matters contained in the record compiled by the Hearing Examiner. A person requesting

an appeal, or opposing it, must send a copy of that request or opposition to the Hearing Examiner, the Board of Appeals, and all parties of record before the Hearing Examiner.

Contact information for the Board of Appeals is listed below, and additional procedures are specified in Zoning Ordinance §59.7.3.1.F.1.c.

The Board of Appeals may be contacted at:

Montgomery County Board of Appeals  
100 Maryland Avenue, Room 217  
Rockville, MD 20850  
(240) 777-6600  
<http://www.montgomerycountymd.gov/boa/>

The Board of Appeals will consider your request for oral argument at a work session. Agendas for the Board's work sessions can be found on the Board's website and in the Board's office. You can also call the Board's office to see when the Board will consider your request. If your request for oral argument is granted, you will be notified by the Board of Appeals regarding the time and place for oral argument. Because decisions made by the Board are confined to the evidence of record before the Hearing Examiner, no new or additional evidence or witnesses will be considered. If your request for oral argument is denied, your case will likely be decided by the Board that same day, at the work session.

Parties requesting or opposing an appeal must not attempt to discuss this case with individual Board members because such *ex parte* communications are prohibited by law. If you have any questions regarding this procedure, please contact the Board of Appeals by calling 240-777-6600 or visiting its website: <http://www.montgomerycountymd.gov/boa/>.